

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

SEAWALL CONSTRUCTION COMPANY;
PETE DeHAAS and STEVE LOVELY,

Appellants,

v.

KING COUNTY,

Respondent.

SHB Nos. 90-51 & 90-52

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

This matter came for hearing before the Shorelines Hearings Board Members: Harold S. Zimmerman, Chair and Presiding, Judith A. Bendor, Annette McGee, Nancy Burnett, and Richard Gidley, on July 11, 1991 in Des Moines, Washington. A non-evidentiary site visit was held with the parties.

At the hearing appellants Pete DeHaas and Steve Lovely appeared pro se. Appellant Seawall Construction did not make an appearance, though they were present in the audience. Respondent King County appeared through Deputy Prosecuting Attorney Michael J. Sinsky. Gene Barker & Associates (Olympia) provided court reporter services.

Witnesses were sworn and testified. Exhibits were admitted and examined. Briefs were filed and parties made oral argument.

On July 8, 1991, the State of Washington Department of Ecology had filed an amicus brief. Appellants filed their reply on July 25, 1991. This filing concluded the matter.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB Nos. 90-51 & 90-52

(1)

1 From the testimony heard, exhibits examined, and argument made,
2 the Shorelines Hearings Board makes these:

3 FINDINGS OF FACT

4 I

5 On September 20, 1980, Seawall Construction Company filed
6 applications with the King County Building and Land Development
7 Division for Shoreline substantial development permits to construct
8 rock bulkheads along the properties of Pete DeHaas and Steve Lovely on
9 Puget Sound in King County, Washington, near the City of Des Moines.
10 Each of the proposed bulkheads would be approximately 6 feet high and
11 60 feet wide.

12 II

13 Both appellants DeHaas and Lovely have recently constructed homes
14 on their respective properties. The homes are located approximately
15 220 feet from the intended location of the bulkheads, on a bluff which
16 slopes sharply upward from the beach.

17 III

18 The subject properties are located with the "urban environment"
19 classification under King County's Shoreline Master Program.

20 IV

21 King County's Shoreline Management Program provides that:

22 *Shoreline protection may be permitted with the urban*
23 *environment provided: ... (d) Shoreline protection*
24 *shall not be considered an outright permitted use and*
shall be permitted only when it has been demonstrated

1 that shoreline protection is necessary for the
2 protection of existing legally established structures
3 and public improvements or the preservation of
4 important agricultural lands as designated by the
5 office of agriculture.

6
7 King County Code 25.16.180.

8
9 V

10 Approximately 20 feet of erosion has occurred along the
11 waterfront of the DeHaas and Lovely properties in the past 30 years.
12 The erosion has occurred due to wave scour during high tidal
13 conditions and is continuing at this time. It is possible that vessel
14 wake action is also contributing to the erosion. An abandoned
15 concrete observation platform on the Lovely property has been damaged
16 by the wave-induced erosion, and an earth foundation under the
17 existing concrete stairway along the property line between the Lovely
18 property and the neighboring Haas property has also been eroded.

19 VI

20 The DeHaas and Lovely residences are located at the top of a
21 bluff, approximately 50 feet back from the bluff line. No evidence
22 was presented that the ongoing erosion presents any actual threat to
23 the DeHaas and Lovely homes in the foreseeable future.

24 VII

25 Any Conclusion of Law deemed to be a Finding of Fact is hereby
26 adopted as such.

1 From these Findings of Fact, the Board makes these

2 CONCLUSIONS OF LAW

3 I

4 The Board has jurisdiction over the parties and the subject
5 matter of this action. RCW 90.58.180.

6 For a shoreline permit to be granted, consistency with the
7 Shoreline Master Program must be demonstrated. RCW 90.58.140.

8 II

9 The Shoreline Master Program ("SMP") at King County Code
10 25.16.180.D permits shoreline protection to be installed:

11 *only when it has been demonstrated that shoreline*
12 *protection is necessary for the protection of existing*
legally established structures [...].

13 Because the County has denied the permit, appellants have to
14 demonstrate compliance with this SMP requirement. See also, King
15 County Shoreline Protection Policy No. 8.

16 III

17 The DeHaas and Lovely homes are legally established structures.
18 Although erosion has occurred and continues to occur at this time, it
19 has not been demonstrated the erosion is a danger to the residential
20 structures on the properties, or that shoreline protection is
21 necessary to protect the structures. The appellants, therefore, have
22 not met the requirements of the Shoreline Master Program at King
23 County Code 25.16.180.D.

24
25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB Nos. 90-51 & 90-52

(4)

IV

Because the appellants did not demonstrate that shoreline protection is necessary for the protection of their existing residences, the application was properly denied by King County and the appeal must be denied.

In so concluding the Board makes note of what has been apparent throughout this case. Appellant's basic thrust is that the King County Master Program at 25.16.180(D) is inconsistent with state statute and state administrative regulations, and is therefore invalid.

V

The Shoreline Management Act specifically excludes certain activities from the meaning of "substantial development" as that term is used in the Act. That exclusion includes:

Construction of the normal protective bulkhead common to single family residences. RCW 90.58.030(3)(e)(ii).

Activities so excluded need not obtain a shoreline substantial development permit, but are not exempt from requirements for shoreline conditional use or variance permits.

The Department of Ecology, in adopting state-wide shoreline regulations at WAC 173-14-040(1)(c), defines a "normal protective bulkhead" as one:

to protect a single family residence and is for protecting land from erosion, not for the purpose of creating land.

1 It is this limitation that King County incorporated in its SMP and
2 which has become a state use regulation. RCW 90.58.100(1); Orion Corp.
3 v. State of Washington, 109 Wn.2d 621, 643, 747 P.2d 1062 (1987).

4 We conclude the King County SMP provision is consistent with WAC
5 173-14-040(1)(c).

6 VI

7 Appellants appear to be challenging the validity of regulation WAC
8 173-14-040(1)(c). The Shoreline Management Act, however, provides that
9 any such challenge be exclusively in superior court. RCW 90.58.180.
10 We therefore do not rule on this issue.

11 VII

12 Appellants challenge whether the King County SMP state regulations
13 are consistent with the Shoreline Management Act.

14 A Shoreline Master Program must be consistent with the policy of
15 the Shoreline Management Act. RCW 90.58.090(1). An SMP which is less
16 restrictive than the Act would be inconsistent. Maloney et al. v. City
17 of Seattle, SHB No. 190. An SMP that is more restrictive than the
18 statute's policy is not inherently inconsistent with the Act. Id.

19 The Shorelines Hearing Board has, in the past, declined to
20 entertain such challenges to Shoreline Management Programs in the
21 context of a shoreline permit appeal:

22 *Whether the "urban" designation is appropriate for*
23 *the center portion of BCE's ownership is not before*
24 *us. The legislative adoption and approval of the SCSMP*
25 *[Skagit County SMP] embodies the broad-scale planning*
process of the SMA which forms the framework for the
permit system. See RCW 90.58.140(2). Our task on
review of a variance [permit] is to construe how the

1 adopted hardship criterias are to be applied where an
2 "urban" designation has been made. Hilda Franzen and
3 The Tulalip Tribes v. Snohomish County, BCE
4 Development, Inc. and the Department of Ecology, SHB
5 Nos. 87-5 & 87-6 (1988), at p. 35.

6 Moreover, the King County SMP is a state regulation. Therefore,
7 under the Shoreline Management Act, an appeal of the SMP when initiated
8 by other than local government, belongs in superior court. RCW
9 90.58.180. We therefore do not rule on this issue.

10 VIII

11 In summary, we conclude King County's denial of the shoreline
12 permit application was consistent with the relevant Shoreline Master
13 Program and other state regulations.

14 We further conclude the SMP regulation limiting bulkheads to those
15 situations when an existing structure requires protection, is
16 consistent with shoreline regulation at RCW 173-14-040(1)(c).

17 We make no conclusions whether either WAC 173-14-040(1)(c) or King
18 County Code 25.16.180 are consistent with the Shoreline Management Act.

19 IX

20 Any Finding of Fact deemed to be a Conclusion of Law is hereby
21 adopted as such.

22 From these Conclusions of Law, the Board enters the following:

ORDER

King County's denial of shoreline substantial development permits to Pete DeHaas and Steve Lovely is AFFIRMED.

DONE this 25th day of September, 1991.

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Presiding

Judith A. Bendor
JUDITH A. BENDOR, Member

Annette S. McGee
ANNETTE S. MCGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Richard Gidley
RICHARD GIDLEY, Member